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ARBITRATION SERVICE OF PORTLAND

**City of Stayton,**

**Claimant,**

vs.

**JCNW Family LLC,**

**Respondent.**

ASP No. 141222

**FINAL AWARD**

An arbitration hearing was held in the above matter on May 11-14, 2015, in Salem, Oregon, before the undersigned arbitrator. This arbitration was conducted under the rules and process of the Arbitration Service of Portland (ASP), pursuant to paragraph 22 of the Development Agreement entered into between the parties. Claimant was represented by Wallace W. Lien and Richard J. Kuhn; Respondent was represented by Darien Loiselle and Stephanie Holmberg. A Preliminary Award was rendered following the guidelines set forth in ASP Rule 31. The Final Award (1) incorporates the additional evidence, information and argument received from the parties as part of the process of developing a workable remedial plan, and (2) includes an award to Claimant of its costs, disbursements and reasonable attorney fees.

The facts recounted below constitute the arbitrator's essential findings of fact, drawn from the evidence produced from the arbitration hearing.

## **FACTS**

1. In 1979, the eastern 10 acres of what is referred to as the Phillips' property, was annexed into the City of Stayton, Oregon. About twenty years after this initial annexation, a contract for agreement to annex the western 10 acres of the Phillips' property was approved by the City of Stayton and the owners of the property. This annexation agreement was extended by the parties until October 7, 2008.

2. Respondent purchased the Phillips' property in 2006. On August 14, 2006, the planning commission for the City of Stayton approved a subdivision for 68 lots on approximately 19.48 acres (Ex #2). A preliminary plat of the proposal was submitted as part of the development process (Ex #8). This approval included a condition requiring the stormwater drainage to be routed to Mill Creek. Thereafter, construction plans were submitted to the City showing a proposed subdivision divided into three phases. In August of 2008, the City approved construction plans for Phase 1. In April of 2009, the subdivision plat for Phase 1 was recorded for the first 20 lots on 5.3 acres.

3. A Stormwater Master Plan for the City (R Ex # 7) was developed over a number of years, with the final plan being adopted in April 2009. The preliminary drafts of this plan guided development in and around the City. The plan describes the Phillips' property as being situated within the Mill Creek drainage basin, which is characterized as having a high groundwater table, poorly drained soils and relatively open flat lands. The plan describes the anticipated need for improvements to expand the City's stormwater facilities to the Phillips' property. The expansion was to be of a size and design sufficient to convey and accommodate existing runoff from the Quail Run Subdivision area.

4. In January of 2010, the City adopted a requirement that the voters of the City must approve any annexations larger than one acre. In June of 2012, the City Council initiated the annexation process for the subject property and referred said annexation to the voters on August 20, 2012. The voters approved the annexation on November 6, 2012. The Santiam Water Control District (SWCD) appealed this annexation to the Oregon Land Use Board of

Appeals. In January of 2013, the Respondent and the SWCD entered into an agreement (Ex #1) resulting in the withdrawal of the LUBA appeal. Thereafter, the City Council finalized the annexation.

5. The settlement agreement entered into between Respondent and the SWCD includes a provision that prohibits Respondent from undertaking “any future development” on the Phillips’ property that would “materially increase the amount of impervious surfaces” on the Phillips’ property “without constructing a City approved stormwater system that would convey the stormwater from the Property to Mill Creek before such development or concurrently with such development.” (Ex #1)

6. During the first six months of 2013, the City worked with the “managing member” for JCNW Family, LLC, Bill Martinak, to negotiate the terms of a development agreement for the area annexed. As part of these negotiations, the City and Respondent had been discussing development of a mechanism for funding the improvements required to address stormwater drainage requirements on the Phillips’ property. In time, it became clear that the City was not in a position to adopt any of the funding sources or mechanisms under consideration (system development charges, development fees on utility charges, or grant proceeds) in time to accommodate Respondent’s timeline for development. Respondent, nevertheless, elected to proceed with the understanding that Respondent would be paying for most, if not all, of the costs associated with the development and construction of a stormwater drainage system. Once this fact was established, Respondent came up with an alternative plan for addressing stormwater runoff on the Phillips’ property, which involved the construction of a detention/infiltration basin in the northwest corner of the Phillips’ property.

7. On June 6, 2013, JCNW Family, LLC and the City of Stayton entered into a Development Agreement (Ex #3) addressing development of Phases I and II. The northwest corner of the property was identified in the Development Agreement as Tract A; the development of Tract A was to be addressed in a separate agreement to be negotiated at the time Tract A “is proposed to be replatted into Phase III.” The Development Agreement (at paragraph 10) grants

to the City an easement across Tract A “for the discharge, retention, detention and accumulation of stormwater from all City sources.” This provision required the developer to manage all stormwater coming onto Tract A from all City sources, at its sole expense. Management of said stormwater was to be conducted by Respondent “in accordance with City standards and regulations, and with City approval of such management systems.” (Ex #3)

8. In June and July of 2013, Respondent’s engineer hired a company to perform infiltration tests (see Ex #s 6 and 7). The first three tests were performed on June 14. From those tests it was observed by the testers that they “did not observe discernible infiltration into the subsurface materials,” and recommended that “the infiltration designer consult the appropriate design manual prior to proceeding with infiltration system design.” (Ex #6). The initial test results were referred to by Respondent’s engineer as “extremely damaging to our cause.” (Page 1 of Ex #6). A follow up test was performed on July 10, which provided the information relied upon in the design drawings prepared in August of 2013 (Ex #9). The test results were not shared with City personnel. The City Engineer testified that upon a later review of the test results (provided in discovery) he concluded that had the results of the tests been provided to him at the time the tests were conducted, he would have rejected the Respondent’s infiltration basin plan because of the limited number of tests performed, the time of year they were performed, and the failure to account for the high water table in the area.

9. The City Engineer reviewed the construction plans a number of times from July through September 2013 (see Ex #s 30-33). In the final review, a number of redline mark ups were included, which Respondent was directed to address before construction began. Construction was commenced without addressing most of the issues set forth in the redline mark ups prepared by the City Engineer.

10. On July 9, 2013, the Phase 2 construction plans were submitted to the City for review. During July and August of 2013, the construction plans went through various revisions. Construction for Phase II began on August 19, 2013. Construction of the retention pond began in early October 2013. At the time, the City Engineer expressed concern that the construction of

the pond was proceeding before the final design had been reviewed and approved by the City (Ex #42)

11. The detention/infiltration basin design is described in detail in Ex #s 9 and #10. The design anticipates a 4.1 inch/hour infiltration rate based on the test performed in the area. The design also anticipates receiving water from the Quail Run subdivision at the rate of 13.3 CFS on a ten-year event (which it was observed is slightly higher than the rate provided for in the master plan). The system was designed to allow for “zero runoff” (referred to as 0 CFS discharge), except in a 50-year storm event.

12. An aerial photo was taken of the retention pond on March 12, 2014 (Ex #19). In mid to late April, the City Planner and the Public Works Director testified that they reviewed the photo and immediately realized that the system wasn’t working right: more water was in the pond than should have been the case if the system was working correctly. They came to the initial conclusion that a hydrological analysis would need to be performed before Phase III could be considered.

13. “As-built” drawings (Ex #29) were prepared in November of 2013. These drawings included a description of a 10” pipe, installed at the base of the weir located at the northwest corner of the retention pond (see Ex #s 5 and 29). The pipe drained water from the pond onto the properties to the north and west of the pond. The 10” drainage pipe was not included in any design drawings prior to its installation and was not installed with the City’s knowledge or approval. The City Engineer first learned about the presence of the pipe in September 2014. Other City personnel became aware of the inclusion of the pipe in the spring of 2014 but did not view the presence of the pipe as significant. Respondent was ordered to plug the pipe in the fall of 2014.

14. The plat for Phase II (lots 21-26 on 7 acres) was approved by the City on April 29, 2014. On May 8, 2014, Mr. Martinak met with City officials for the purpose of discussing the development of Phase III. At that meeting, the City raised concerns with Mr. Martinak about the design and construction of the drainage basin and the need for further analysis and study before

considering the development of an agreement relating to Phase III. The concerns and directives from the City relating to the drainage basin were outlined by e-mail from the City Engineer, John Ashley, to Martinak and Ward, dated May 9, 2014 (Ex #15). In this email, Ashley asks the developer to prepare a more detailed study and analysis, and makes it clear that the analysis would have to be “completed before you prepare and submit plans for the next phase.” Between May and September, for various reasons explained by Martinak and Ward at the hearing, very little was done towards the development of a more thorough analysis.

15. On September 23, 2014, Mr. Martinak and Mr. Ward (representing Respondent) met with the City Administrator and City Engineer, among others. Respondent wanted to know if they could finish Phase IIB of the development. Martinak and Ward were informed by City personnel present that there would be no further development until a satisfactory analysis of the detention basin had been completed. At this meetings, the City Engineer informed the Respondent in detail exactly what additional testing and analysis would have to be performed. Ward and Martinak requested of the City proof that the retention basin was not working as designed. In this meeting, Mr. Ward shared with Mr. Ashley for the first time a set of “as-built” plans, prepared on November 4, 2013 (Ex #29). Shortly after this meeting, Campbell and Ashley reviewed the “as-built” plans; in that review they discovered for the first time the presence of the 10” pipe built into the base of the weir. To Campbell and Ashley, the undisclosed inclusion of the pipe in the weir was a “game changer” because it defeated the stated goal of the retention pond to accomplish “zero discharge.”

16. In September and October of 2014, Mr. Martinak met with City officials to discuss the design and function of the retention pond. On October 17, 2014, Mr. Martinak met with Keith Campbell for the purpose of addressing concerns over the design of the retention pond. It was acknowledged by all parties at that time that the retention pond could not appropriately address the storm drainage demands being placed upon it. Mr. Martinak indicted at the time that he didn’t believe there was a cost-effective solution.

17. On October 20, 2014, the City Council went into executive session where the

Council discussed with the City Administrator a proposal for issuing a stop work order until the deficiencies in the retention pond could be properly addressed. The next day, City Administrator, Keith Campbell, issued a stop work order (Ex #35). Thereafter, two revisions were approved to the stop work order to allow construction to continue on those properties where the City had issued building permits. The last revision was approved and issued by the City Council on November 12, 2014 (Ex #37).

18. In November of 2014, Mr. Martinak submitted to the City the plans for Phase III. These plans were resubmitted two additional times to the City. Each time, the City rejected receipt of the plans on the basis that no further development could take place until the retention pond issues had been properly addressed.

19. On November 28, 2014, water was observed flowing over the top of the weir. The record (Ex #41) reveals the fact that, during the winter of 2014-2015, water spilled over the weir on numerous occasions. The retention pond was designed to only allow water to spill over the weir in a 50-year storm event. The parties acknowledged that nothing close to a 50 year storm event had occurred during this time and that the retention pond, as designed and built, was inadequate to ensure a “zero discharge” standard.

20. The water that spilled over the weir from the pond passes onto neighboring property to the northwest and eventually makes its way to the Salem Ditch, which is controlled and maintained by the SWCD (see Ex #20). Allowing water to pass onto neighboring properties from the Phillips’ property raises trespass issues in addition to potential violations of the settlement agreement between Respondent and SWCD (Ex #1) and the Memorandum of Understanding between the SWCD and the City (Ex #34).

21. The Quail Run subdivision included a stormwater drainage system that pumped the water to the south for ultimate diversion into the Salem Ditch. This system was developed because the owners of the Phillips’ property refused to allow the water from the Quail Run storm drainage system to run onto their property. In 2009, Mr. Martinak was approached by City officials with a request that Respondent allow the water from the Quail Run storm drainage

system to run onto the Phillips' property, due to ongoing issues with the existing pump based system (see R Ex #6). Mr. Martinak consented to this request with the understanding that the cost of addressing the stormwater needs of the basin would be substantially shared by the City and others (see Ex #s 24 and 25 email exchanges). The Quail Run line was extended to Tract A of Respondent's property, pursuant to an easement granted to the City by Respondent (Ex #4). The City paid for the improvements to accomplish this project but did not compensate the Respondent for the future cost of managing the water from the Quail Run subdivision. Mr. Martinak estimated that the cost of addressing the Quail Run water runoff equals approximately \$20,000 per year. There was no evidence offered in support of this opinion.

22. Respondent's project engineer, Steve Ward, testified that the 13.3 CFS for a ten year event was the estimate he used to determine the amount of water passing from the Quail Run subdivision onto the Phillips' property. This estimate was based on a calculation relating to the likely amount of impervious surfaces in the Quail Run subdivision and not on actual measurements. He testified that he did not consider the fairly constant flow of groundwater that flows from the Quail Run storm drainage system onto the Phillips' property. Further, Mr. Ward testified that he did not perform adequate infiltration tests but tried to go forward with the limited testing that was performed because the developers were under pressure to resolve the drainage issue so the project could move ahead. He agreed that the retention pond, as designed and built, was inadequate to address existing water drainage issues and that he expects that water will continue to flow through the pond onto neighboring properties and beyond during the winter months.

23. Pursuant to Section 22 of the Development Agreement, the parties agreed to attempt to mediate disputes relating to the provisions of the Agreement. While the parties continued to, with limited success, meet to attempt to address the on going issues with the stormwater drainage system, no formal mediation session was requested by either party before adoption of the stop work order. The parties did negotiate minor changes to the stop work order. In November of 2014, the parties agreed to schedule a mediation session for the purpose of



addressing issues relating to alleged breaches of the provisions of the Development Agreement.

24. In late November of 2014, City officials observed water overtopping the weir in the retention pond, which heightened the sense of urgency from the City's perspective to take action to timely address the fact that the retention pond was not going to properly address the stormwater demands. Respondent did not share this same sense of urgency while indicating to Claimants that a mediation session could be scheduled in January 2015. Under these circumstances, in the context of a history of what the City perceived to be Respondent's failure to promptly address the stormwater drainage issues, the City decided to assert its right to demand arbitration, which it did just before Christmas 2014. Neither party attempted thereafter to initiate a formal mediation process.

25. In its cost bill, the City is asking for reimbursement of the attorney fees incurred by attorneys Wallace Lien and Richard Kuhn in the prosecution of its claims and in the defense of the claims asserted against the City. The City seeks an award under the cost bill in the sum of \$145,223.80 through June 18, 2015. In March of 2015 Mr. Kuhn became counsel for the City for the purpose of defending the City against the tort claims asserted in Respondent's responsive pleading. The City has a contractual relationship with its insurer to provide a defense for such claims. Since March of 2015, both attorneys have represented the interests of the City in this action, including participation in the depositions conducted in discovery and in the arbitration hearing.

### **CONTENTIONS OF THE PARTIES**

The City of Stayton contends that JCNW Family, LLC breached seven specific provisions of the Development Agreement entered into between the parties. The alleged breaches essentially maintain that the Respondent failed to properly design a storm detention/retention basin and outfall structure on Tract A, that construction of said basin was not in accordance with the original plans and that changes were made to the plans during construction that were not approved by the City. The City asks that Respondent be found in breach of the agreement as alleged, that the stop work order be declared valid and be allowed to

continue until each of the breaches are addressed and that Respondent pay the City's reasonable attorney's fees.

JCNW Family, LLC contends that the design and construction of the retention basin is a work in progress and will be finally and appropriately addressed as part of the development of Phase III. Further, Respondent alleges three counterclaims against the City, as follows: (a) breach of contract alleging that the City has failed to pay its proportional share for the storm drainage system planned for construction in Phase III and that the City has breached the requirement in the Development Agreement that the parties enter into a separate agreement regarding Phase III; (b) intentional interference with economic relations, alleging that the City interfered with Respondent's prospective commercial relationships with home builders by issuing a stop work order and by failing to follow through with a Development Agreement for Phase III; and (c) trespass alleging that the City has intentionally permitted stormwater discharge to pass onto Respondent's property. Respondent seeks damages from the counterclaims alleged, including an award of attorney's fees.

### **DISCUSSION**

This action primarily turns on the reasonable interpretation of the terms of the Development Agreement entered into between the parties, as viewed in the context of events that preceded and followed the Agreement's execution on June 6, 2013.

Before this Agreement was entered into, the Planning Commission had granted initial approval of the Phillips Estate Subdivision in August of 2006 and a Stormwater Master Plan had finally been developed in April of 2009. The decisions by the City represented in these documents establish the general parameters for the terms included in the Development Agreement.

In the summer of 2009, the City and Respondent entered into an agreement for the extension of a pipe from the Quail Run Subdivision to divert stormwater from that subdivision onto the northwest portion of the developers' property. The City paid for the construction of the extension of the Quail Run outlet pipe but did not compensate the Respondents for any future

expenses relating to the management of the additional stormwater being brought to the developers' property.

During the years leading up to the signing of the June 2013 Development Agreement, the City and Respondent had extensive discussions about how the planned stormwater drainage system for diversion of the water to Mill Creek would be paid for. It was anticipated by all concerned that the ultimate expense would be shared between the City, Respondents and others who would benefit. It was hoped that the sharing of the cost would be accomplished through a mechanism that required participation by all benefited by the system.

In the spring of 2013, it became apparent that a funding mechanism could not be developed in time to accommodate the timeline the developers were working with. Rather than wait for the City to develop a funding mechanism, the representatives for the developer initiated a discussion around the development of a solution in the form of a retention basin to be constructed on what was designated as Tract A. This solution would allow the development to go forward in a timely manner.

The general requirements for this solution were set forth in the Development Agreement. The Development Agreement requires, in pertinent part, that (1) Respondent will manage stormwater coming onto Tract A from all City and Phillips' property sources at the developer's expense and in accordance with City standards and regulations and with the City approval of such management systems (see Ex #3), (2) Respondent would install on Tract A, an "on-site storm detention/retention basin and outfall structure," and (3) the agreement was binding on any assigns or successors in interest of the development. The retention basin solution was further guided by the agreement Respondent had entered into with the Santiam Water Control District and a Memorandum of Understanding the City had entered into with said District – both of which restricted the diversion of water from the Phillips' property across property where the water ultimately ended up in a ditch controlled by the SWCD.

As recounted in the findings set forth above, the retention basin was constructed in October and November of 2013. The design of this pond was based upon (1) infiltration tests

conducted the previous summer and (2) a very rough estimate of the amount of water that would come into the basin from the Quail Run Subdivision. As discussed above, the design of the pond was flawed because the infiltration testing was inadequate and the estimates relied upon for water flowing into the basin from the Quail Run Subdivision were not based upon the collection of actual data from the site. Because the design was flawed, the retention basin failed to accomplish the ultimate objective of accommodating the infiltration of all water flowing into the pond except under the circumstances of a 50 year storm event. Finally, the retention pond was constructed based on a final design that was not approved by the City.

There is no question that the City has a right to enforce its ordinances and agreements. That authority may be reasonably delegated to the City Administrator (Ex #s 27 and 45). The issuance of a stop work order is justified under circumstances that warrant the reasonable use of this enforcement tool. With respect to the issuance of the stop work order by the City, the evidence supports the following conclusions:

(1) At the May 8, 2014 meeting, Respondent was put on notice that the issues with the retention basin would have to be addressed if further development was to be permitted by the City.

(2) Four and a half months later, the parties met to discuss all pending development issues. Respondent had done nothing at that time to address the issues raised in the May meeting. At the September 23 meeting, Respondent was informed that there would be no further development until a satisfactory analysis of the detention basin had been completed.

(3) Additional meetings between the parties took place before October 20, when the City Council convened in executive session to hear from the City Administrator the history and rationale supporting the proposal to issue a stop work order. The City Council took no action to stop the City Administrator from issuing the stop work order the next day (Ex #35).

(4) The stop work order was modified by the City Administrator on November 3 (Ex #36) and was further modified by the City Council on November 12 (Ex #37). This last stop work order is presently in effect.

The reasonable use of the stop work order as an enforcement tool may require the City to articulate a detailed, clear and reasonable road map leading to the lifting of said order, within a reasonable time frame.

The Respondent maintains that the City is obligated by agreement to “pay its proportionate share for the storm drainage system planned for construction in Phase III.” The Development Agreement entered into between the parties (Ex # 3) includes the following provisions:

What was originally proposed as Phase III, is a future phase of the development, which will be identified in bulk as Tract A on the plat for Phase II. . . . The terms and conditions for development of Tract A will be under a separate Development Agreement to be negotiated at the time Tract A is proposed to be replatted into Phase III. (See page 2 of the Development Agreement)

Any work towards developing a final agreement for Phase III of the subdivision was to be memorialized in a separate Development Agreement. There is no credible evidence in the record to the contrary. Further, as referred to in the findings above, the parties did enter into preliminary discussions for sharing the cost of building a stormwater drainage system from the Phillips’ property to Mill Creek, as contemplated in the planning commission approval and the Stormwater Master Plan. However, once it became clear that a funding mechanism was not going to be developed in a timely manner, the parties abandoned the original Stormwater Drainage Plan for stormwater management from the Phillips’ property and replaced it with the retention basin proposal for addressing this stormwater need. An agreement was never entered into between the parties regarding the cost sharing for building the drainage facility to Mill Creek other than the understanding reached that the cost for constructing the stormwater detention basin would be borne by Respondent. For the reasons stated, no obligation arose that would require the City to pay a proportional share of the storm drainage system construction costs; the first count for breach of contract fails.

In Count 2, Respondent alleges that the City breached provisions of the Development Agreement by requiring Respondent to perform obligations associated with Phase III. There is

no evidence in the record that Phase III would involve the construction of a stormwater drainage facility different from the retention basin that was constructed relating to Phase II. Further, it is observed that there is no deadline set forth in the Development Agreement for Phase II for the parties to enter into a Development Agreement for Phase III. It is implied from the language of the Development Agreement that an agreement for Phase III would be negotiated and initiated after Phase II had been substantially completed in accord with City standards, directives and guidelines. For these reasons, Respondent's second count for breach of contract fails.

Respondent alleges in the second counterclaim that the City intentionally interfered with Respondent's prospective commercial relationships with builders for homes in Phase III by issuing a stop work order and by failing to proceed to negotiate a Development Agreement for Phase III. The Oregon Supreme Court has clearly stated that the tort of intentional interference with economic relations requires the satisfaction of six essential elements (*See McGanty v. Staudenraus*, 321 Or 532 (1995)), and that the third of said six elements requires that a "third party" initiate such interference. The evidence at the hearing established that Respondent was the sole owner of Tract A. There was no credible evidence that Respondent had negotiated contracts or understandings with third parties relating to development in Phase III.

Further, this arbitrator has found that the stop work order was valid and that the City appropriately asserted its right to resolve issues by arbitration as provided for in the Development Agreement at issue herein. There is no evidence that would satisfy the fourth element required for this cause of action, which requires that the interference be accomplished through improper means or for an improper purpose. Finally, any assertion of damages on this claim is entirely speculative.

With respect to Respondent's final counterclaim, a trespass requires credible evidence that would establish the unauthorized entry onto land owned by the party asserting this claim. In this case, the diversion of water from City sources to Respondent's property, Tract A, was authorized and agreed to between the parties. As a condition of allowing the Respondent to go forward with development plans, the Respondent agreed to allow the City to divert water from

the Quail Run Subdivision onto Tract A. The critical language is found in the Development Agreement (paragraph 10) where the Respondent grants to the City an easement over the entirety of Tract A for “the discharge, retention, detention and accumulation of stormwater from all City sources.” Said provision requires Respondent to manage this stormwater “at its expense in accordance with City standards and regulations.” The easement was formally adopted facilitating this understanding (Ex #4).

This issue turns on the fact that Respondent agreed to accept the water from the Quail Run Subdivision onto his property and to appropriately manage said stormwater in the context of the contractual obligations then existing; specifically, the Stormwater Master Plan (R Ex #7), the settlement agreement between SWCD and Respondent (Ex #1), the planning commission approval of the subdivision (Ex #2) and the memorandum of understanding entered into between the SWCD and the City (Ex #34). While the City did pay for the extension of the water line to Tract A, the City did not specifically compensate Respondent for the future cost of managing the stormwater that was being placed on Tract A. Because there was no negotiated and enforceable agreement between the parties regarding this obligation being placed on the Respondent, it can only be assumed that Respondent was willing to accept this anticipated obligation as part of the effort to keep the development process moving ahead. From all indications, the development process would have successfully moved forward with the development of an agreement regarding Phase III and the approval of a plat relating to this final phase had Respondent complied with its obligations to properly manage the stormwater coming onto Tract A.

Respondent raises objections to the cost bill submitted by Claimant. Respondent’s objections to Claimant’s cost bill, with respect to the award for reasonable attorney fees, are well taken. When the City decided, in late December 2014, to assert its right to arbitration, the parties were in the middle of scheduling a mediation session to discuss the issues that have now – some nine months later – been resolved through arbitration. Given the history of foot-dragging on the Respondent’s part, as addressed above, one can appreciate the City’s frustration and desire to more assertively address the issues with the Development Agreement, by taking action to

establish a final resolution through arbitration. However, it is reasonable to assume that had the mediation been initiated in January 2015, it is likely that a workable remedy could have been worked out between the parties by the end of the winter months, saving both sides the significantly greater cost of proceeding to arbitration.

While the Development Agreement does not make mediation mandatory, the standards applicable to an assessment of reasonable attorney fees invites an inquiry into the efforts made to settle the dispute short of incurring the costs associated with litigation. (See ASP Rule 34C, which mirrors the statutory standard set forth at ORS 20.075 (1) (f)). Of course, there is no guarantee that mediation would have resulted in a final resolution of the issues; however, the City was obligated to make a good faith effort to follow through with the scheduling of a formal mediation session and then to work within that process to develop a workable plan.

Further, the City chose to use two attorneys to represent its interests in this action. The City did not need two experienced attorneys to represent its interests in this action. With respect to this objection, the points made by Mr. Kraemer in argument are well taken: (a) for the most part, the two attorneys handled separate issues relating to the claims and defenses asserted, and (b) if Mr. Lien would have handled all of the issues relating to Claimant's interests, the City would have been charged \$300/hour (Mr. Lien's hourly rate) and not \$185/hour (Mr. Kuhn's hourly rate). An examination of the record produced on this issue reveals that there were times in the prosecution of claims and in the defense of the counterclaims when one attorney could have reasonably handled the interests of the City – most notably during the taking of depositions and during the arbitration hearing. The arguments relating to how many attorneys Respondent used and what they were paid is not directly relevant to a determination of the reasonable attorney fees Claimant is entitled to recover.

Based on the above-stated findings and discussion, the attorney fees claim is addressed as follows: All attorney and staff fees are reduced by 25% based on the finding that the opportunity for resolving the dispute through mediation was not adequately explored by the City. This



percentage would have been higher but for the fact that the Claimant prevailed on all claims. Further, from a review of the fees generated by Mr. Kuhn's office, there were 70.3 hours devoted to work that duplicated the work performed by Mr. Lien. The fee is, therefore, further reduced for that reason – adjusted to account for the difference between Mr. Lien's hourly rate and Mr. Kuhn's hourly rate. Using this formula, the adjustment of attorney fees looks like this:

Lien attorney fees (\$88,680) reduced by $\frac{1}{4}$ =	\$66,510.00
Lien staff fees (\$580) reduced by $\frac{1}{4}$ =	\$435.00
Lien office costs	\$1,054.94
Kuhn attorney fees (\$42,827.50) reduced by $\frac{1}{4}$ = \$32,120.63	
Reduced by duplicate work (70.3 hours x \$185/hr. adjusted as stated above) = \$4,921.00	
Total Kuhn fees after adjustments =	\$27,199.63
Kuhn staff (\$212.50) reduced by $\frac{1}{4}$ =	\$159.38
Kuhn office costs =	\$6,018.88
Total costs, disbursements and attorney fees award =	\$101,377.83

### **RULING**

1. Based on the previously stated findings of fact and discussion, the Respondent is hereby found to be in breach of sections 1, 3 and 10 of the Development Agreement in the following particulars:

a. The storm detention/retention basin and outfall structure, provided for in section 12 d (3) of said Agreement, was constructed using a design not approved by the City, as required by sections 1 and 10 of said Agreement. The evidence supports the conclusion that said basin was built using a design not approved by the City.

b. The storm detention/retention basin and outfall structure was not constructed in conformance with City standards and directives, as required by section 3 of said Agreement. The evidence supports the conclusion that said basin was not built in accordance with the standards and conditions of approval clearly articulated by the City engineer during the plan review process (see Ex #31, pages 3 and 4 of 8; Ex #32, page 3 of

4; and Ex #33).

2. Based on the stated findings of fact and discussion, the arbitrator concludes that the stop work order issued by the City Administrator, and later reissued by the City Council, as articulated above, is valid and may be reasonably enforced.

3. Pursuant to Section 22 of the Development Agreement, Claimant, as the prevailing party, is awarded its costs and disbursements, including attorney fees. The amount of said costs and disbursements has been determined herein based on the guidelines set forth in Rule 34 of the ASP Procedural Rules for Arbitration, as discussed above.

4. There has been no violation of the obligation under Section 22 to consider the option of mediation. The facts relating to this issue have been considered in the development of the award of reasonable attorney fees.

5. Respondent's claims for Breach of Contract, Intentional Interference with Economic Relations, and Trespass all fail for the reasons articulated above.

6. Any claim not expressly addressed in this award is denied.

#### **FINAL AWARD**

1. While the parties were addressing the cost bill presented by Claimant (ASP Rule 34 (A) (1)), the arbitrator requested the submission of supplemental briefing to address the following questions and issues: (a) the specific requirements Respondent must satisfy for the stop work order to be lifted and (b) the conditions under which the stop work order could be lifted while the specific requirements are being addressed. Said supplemental briefing was provided by the parties, followed by a hearing; the parties provided additional briefing after the hearing to summarize their respective proposals.

2. Based on the findings and rulings of this Arbitrator, as set forth above, the following remedial plan is adopted:

a. **Development of a Stormwater Drainage Report:** Respondent will perform a Stormwater Drainage Analysis; the testing, findings and conclusions of this analysis will be contained in a Stormwater Drainage Report. Said analysis will include an investigation of the

hydrologic, hydraulic and geotechnical issues presented by the proposed drainage development plan together with appropriate solutions to those issues. This report will provide the basis upon which the stormwater drainage project will be designed. The report will include a provision addressing any anticipated issues the project will create relating to wetlands.

b. **Development of Engineered Design and Construction Plans.** The Respondent will prepare an engineered design and construction plan based on the Stormwater Drainage Report.

c. **Resolve of Outstanding Issues.** The issues remaining from the implementation of Phase II of the Development Plan will be resolved, those being: (1) completion of necessary punch list items; (2) resolving issues relating to reimbursements; and (3) providing the operation and maintenance materials required by the SWMM. The stop work order will not restrict the Respondent from addressing these issues.

d. **Reasonable Bonding Requirements.** Respondent will obtain a performance bond in an amount not less than 125% of the final approved construction estimate for the stormwater drainage system, in accordance with the City of Stayton Public Works Design Standards.

e. **Development of a Functional Temporary Stormwater Drainage System.** Respondent will develop a functional temporary stormwater drainage plan designed to prevent the escape of stormwater from the Phillips property on to private property to the northwest of said property during the time the permanent stormwater drainage system is being studied, planned, designed and constructed. It is anticipated that this temporary stormwater drainage system will be approved and constructed to prevent the escape of stormwater from the Phillips property on to private property.

f. **The Interim Issuance of Building Permits.** The gradual lifting of the stop work order in phases, as the remedial plan is developed and constructed, is a reasonable exercise of the City's regulatory authority to address stormwater drainage issues while taking into account legitimate private interests impacted by this regulation. At present, 25 legal lots are situated in

Phase I (four lots) and Phase II (21 lots) of the Phillips Property Development. The stop work order in place prohibits the issuance of building permits on all of these lots. As the above-stated remedial plan progresses, the stop work order will be lifted, and building permits may be applied for and issued, under the following schedule:

**Step One:** Upon the approval of a satisfactory temporary drainage system, the stop work order will be lifted as to four building permits.

**Step Two:** Upon the approval of the Stormwater Drainage Report, the stop work order will be lifted for three more building permits.

**Step Three:** Upon the approval of the easements for the final routing of the stormwater drainage system, the stop work order will be lifted for three additional building permits.

**Step Four:** Upon the approval of the final design and construction plans for the stormwater drainage system, the stop work order will be lifted for three additional building permits.

**Step Five:** The stop work order will be terminated in its entirety upon completion of the stormwater drainage facility

g. The design and construction of the temporary and permanent stormwater drainage systems included in this remedial plan will conform to all applicable legal standards.

h. Respondent may not submit plans for Phase III of the development until the issues involved in Phase II have been resolved.

i. By stipulation of the parties, a mechanism is hereby adopted for addressing impasses that may arise with the implementation of the above-stated remedial plan. The undersigned Arbitrator will retain jurisdiction over the issues raised in this arbitration action and has authority hereby to resolve any and all impasses or disputes between the parties that may arise relating to the implementation of the remedial plan set forth in the Final Award and related supplemental awards.

3. Award of costs and disbursements. A hearing was conducted on August 3, 2015

for the purpose of receiving evidence and argument from the parties regarding the Claimant's cost bill and Respondent's objections thereto. Based on the findings and discussion set forth herein, an award for costs, disbursements and reasonable attorney fees is granted in favor of Claimant and against Respondent in the sum of \$101,377.83. Counsel for Claimants may submit a request for entry of a supplemental award for reasonable attorney fees and cost incurred between June 18, 2015 and the entry of the supplemental award.

4. In accord with the Development Agreement (section 22) and ASP Rule 36, once a Final Award is adopted, a judgment may be entered in Marion County, Oregon, upon the Final Award.

### **MONEY AWARD**

Award Creditor:

City of Stayton  
362 N. 3<sup>rd</sup> Ave.  
Stayton, Or 97383

Attorneys for Award Creditor

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Award Debtor

JCNW Family LLC

Attorneys for Award Debtor

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Portland, OR 97204

Total Amount of the Award

Attorney & Staff Fees	\$94,304.01	
Costs	\$7,073.82	
Total		\$101,377.83

Pre-Award Interest

None

Post-Award Interest

Simple interest at the rate of 9% per annum,  
from the date of the Final Award

DATED this 12<sup>th</sup> day of August 2015.

----- Signed -----

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Daniel L. Harris, Arbitrator